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No. 547

Office Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1958

DAVID BOHN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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David Bohn prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit rendered on November 6, 1958.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the District Court (R. 22-23-24) printed in Appendix A, infra, page 21, is not reported. The Opinion of the United States Court of Appeals for the Eighth Circuit, printed in Appendix B hereto, infra, page 23, is not as yet reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on November 6, 1958 (Appendix C, page 35, infra). The jurisdiction of this Court is invoked under Title 28, United States Code, Sec. 1254(1) and Part V, Rule 19(b) of the Supreme Court Rules.

QUESTIONS PRESENTED

1. Was the defendant-appellant denied to him the protection of Amendment IV of the Constitution of the United States against unreasonable searches and seizures, where the warrant was issued without probable cause that a "wagering" business was being conducted at the dwelling house of the defendant-appellant; the affidavits in support of the issuance of said search warrant did not show that any of the persons making said affidavits were ever on or within the premises and/or observed such business being so conducted thereon, and/or that they observed any property on said premises particularly described in the affidavits being used to conduct a wagering business. The search made did not disclose a "wagering" business being conducted on the dwelling premises, nor did it disclose any other crime being conducted thereon, nor was any of the things described in the search warrant found in the dwelling house. The searching officers seized and carried away three books purported to be income tax records of defendant, not described in the warrant.

Motion to return and suppress denied to defendant-appellant, and Government used said three books (Exhibits 23, 24, 25) to secure conviction of defendant.

The trial court and United States Court of Appeals for Eighth Circuit held Amendment IV not violated.

2. Was the defendant-appellant denied to him the protection afforded by Amendment VI of the Constitution of the United States, wherein it is provided that in all criminal proceedings the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation * * * where the indictment purporting to charge that defendant-appellant wilfully attempted to evade the 10% wagering taxes, failed to inform the defendant (1) in what city, county or state or district the said wagering business was conducted, (2) that the business was conducted by one Samuel Golden, an alleged employee of defendant, and (3) that wagering taxes in a substantial amount, or in any amount, was due the Government.

Motion to dismiss indictment, and for Bill of Particulars denied by trial court, and affirmed by Court of Appeals.

3. Was the defendant-appellant denied due process of law as provided in Amendment V of the Constitution of the United States, where the Government failed to prove affirmative acts of "wilful attempt" to evade wagering taxes; the defendant conceding no returns filed and no wagering taxes paid, and in the trial court failing to instruct the jury, when requested, as follows:

> "You may not find the defendant guilty of a wilful attempt to defeat and evade wagering taxes as charged in the two counts in this indictment if you find only that he had wilfully failed to make a return of wagering tax income and had wilfully failed to pay the tax on claimed wagers placed with him (Spies vs. U. S., 317 U.S. 492)."

The trial court denied the motion for a directed verdict; denied the requested instruction, motion for judgment of acquittal and for a new trial, and the United States Circuit Court of Appeals for the Eighth Circuit affirmed.

4. Was the defendant denied due process of law as provided in Amendment V of the Constitution of the United States, where the Government tried the defendant on the theory that he was a "Bookmaker" and persistently asked witnesses their opinion as to whether defendant was a "Bookmaker" over objections from defendant, and where the Court denied a request of defendant that it define for the jury in its charge the meaning of the words "doing business" as meant and intended by the wagering tax law, Title 26 USCA, Sec. 4401. And further, was defendant denied due process of law where the trial court refused to instruct the jury as requested as follows:

"V.

"The statute provides that one must be 'engaged in the business of accepting wagers on sports events or contests.'

"To be engaged in business of accepting wagers, one must hold himself out to the public as one who will accept wagers on the results of both sides of sports events or contests. These persons are commonly referred to as 'bookmakers.' To be a bookmaker, one makes a public quoting and offering of odds, with the soliciting of bets, and induces the public to take chances with him on contests and events; the passing of money or property, and the resulting win or loss on the transaction. The term 'bookmaker' comes from the keeping of a book or paper to record the wager (Words & Phrases).

"VI.

"The tax is not applicable to persons who make personal or individual, social or friendly bets or wagers on

the result of sporting events or contests, no matter how many such wagers are made or in what amount they are made, so long as one is not engaged in the business. Therefore, before you can find the defendant guilty of the offenses here charged, you must find from the evidence and beyond a reasonable doubt, that the defendant was engaged in the business of accepting wagers. If you find from the evidence that the wagers he made were of a personal or individual character, then the Government has not established the first requirement of its burden and that ends your deliberations, and you must find the defendant not guilty."

And further, was the defendant denied due process of law, where the jury returned and specifically requested of the trial court that he define for them the meaning of "Bookmaker" and "taking bets on both sides of a contest" and the Court refused to define said terms for the jury.

These questions raised before the trial court on motion for judgment of acquittal and for a new trial, which were denied by the trial court, and affirmed by the United States Court of Appeals for the Eighth Circuit.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT IV:

"The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V:

That part thereof reading as follows:

"No person shall be * * * deprived of life, liberty or property without due process of law;"

AMENDMENT VI:

"In all criminal prosecutions the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation."

STATUTORY PROVISIONS INVOLVED

Section 4401, Internal Revenue Code (Title 26 USCA, Sec. 4401) imposes the excise tax as follows:

"(a) Wagers.—There shall be imposed on wagers as defined in Section 4421 an excise tax equal to 10 per cent of the amount thereof.

* * * * *

"(c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery."

Section 4421, Internal Revenue Code of 1954 (Title 26, U.S. Code, Sec. 4421) defines "wagers" as follows:

"(1) Wager.—The term 'wager' means—

(A) Any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting wagers."

Section 7201, Internal Revenue Code of 1954 (Title 26, U.S. Code, Sec. 7201) provides as follows:

"Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, shall be fined not more than $10,000 or imprisoned not more than five years, or both, together with the costs of prosecution."

STATEMENT OF CASE

Petitioner, a resident of Minneapolis, Minnesota, was indicted in the United States District Court for Minnesota on two counts (R. 10 to 13), wherein he was charged with wilfully attempting to evade and defeat the 10% wagering taxes imposed by Section 4401, Internal Revenue Code, Title 26, U.S. Code, Sec. 4401, in violation of Section 7201, Internal Revenue Code, Title 26, U.S. Code, Sec. 7201. He was tried before court and jury and convicted on both counts and judgment and sentence imposed upon him (R. 159-160) (R. 164-165). Motions for judgment of acquittal or new trial were made and denied by the trial court (R. 160-161 to 164). Appeal was taken from said judgments to the United States Court of Appeals for the Eighth Circuit (R. 165 to 167) and the judgments affirmed by that Court (R. Appendix Exhibit C).

The facts material to the questions here presented are as follows:

(1) On November 9, 1956, the United States Attorney caused to be issued by the United States Commissioner a Search Warrant for the dwelling premises of petitioner in Minneapolis, Minnesota (R. 7 to 10). The affidavits of the persons referred to in the Warrant (R. 7) pertained to many other persons and places, as well as petitioner, and

a large number of similar search warrants were issued by the United States Commissioner for such other persons and places. The claimed "probable cause" submitted to the United States Commissioner pertaining to all the persons and places is included in Appellee's Supplemental Record, pages 28 to 79, inclusive. The substance of these affidavits pertaining to petitioner and his residence is located at Supplemental Record of Exhibits, pages 169 to 172, inclusive, and they show that during 1956, there were a large number of long-distance telephone calls to and from his residence phone (Walnut 2-2879). (Supplemental Record of Exhibits, page 169). That a surveillance was maintained over him from September 8, 1956, to November 9, 1956, and he was observed driving his automobile to and from his home and the Park Plaza Hotel in Minneapolis. That he was observed in company with one Jack Apple, a known gambler (Supp. Record 169) and that he was observed carrying books and papers (Supp. Record 169). That petitioner received registered letters addressed to his home address (Supp. Record 170) and that his income tax returns for years 1954, 1955 and 1956 showed his income to be from "Gambling—dice and cards" (Supp. Record 172). Search of dwelling disclosed no wagering business being conducted at and on premises nor any other crime being committed in presence of searching officers (R. 83). Things particularly described in warrant (R. 7-8) not found in premises (R. 9-10) (R. 83-84), but officers seized Exhibits 23, 24 and 25 purported to be income tax records of petitioner (R. 84) not described in warrant (R. 7-8) and seizing officer testified at trial he had no knowledge as to whether said exhibits were correctly or incorrectly kept (R. 93-94). Motion to return and suppress said Exhibits 23, 24 and 25 made and

denied (R. 13 to 17) (R. 22 to 24) and objection to admissibility overruled (R. 82). Error was claimed in Motion for New Trial (R. 161 to 164) which was denied (R. 6) and question raised on appeal to United States Court of Appeals, Eighth Circuit.

(2) The Indictment purported to charge a violation of Section 7201, Title 26, U.S. Code, of wilfully attempting to evade the 10% wagering taxes provided for by Title 26, U.S. Code, Sec. 4401 (R. 10 to 13). It will be noted that the indictment states in part (R. 10):

> "That during the fiscal year ending June 30, 1956, defendant * * * *a resident* of Minneapolis, Minnesota, *was* within the meaning of the Internal Revenue Code of 1954 *engaged in the business of accepting wagers and became liable and was required to pay the excise tax* on wagers * * * that he was required by law * * * to pay said wagering tax * * * and to make a wagering tax return * * * to the Director of Internal Revenue for the Internal Revenue Collection District of Minnesota; * * * he did wilfully attempt to evade * * *." (R. 11)

Petitioner moved to dismiss the indictment on the ground that the indictment did not contain a plain, concise and definite statement of the essential facts constituting the offense purported to be charged, and that the facts set forth are insufficient to charge an offense against the laws of the United States (R. 17-18). Petitioner urged upon the trial court and the United States Court of Appeals for the Eighth Circuit and urges here, that the indictment fails to allege:

(a) The city, county, state or district where the alleged wagering business was being conducted.

(b) That the claimed wagering business was conducted by one Samuel Golden, an alleged employee of defendant; and

(c) That wagering taxes in a substantial amount, or in any amount, were due the Government.

Petitioner moved for a Bill of Particulars and requested the same information (R. 18 to 22); particularly calling the Court's attention to Requests (2) and (5) of Record, page 19:

> "(2) For the periods alleged in Counts I and II of the Indictment, in what city and state does the United States Attorney contend the said 'business of accepting wagers' was being conducted by defendant, and at what address or addresses in said city and state?"
>
> "(5) For all periods which the United States Attorney contends and intends to prove that the defendant was conducting a business of accepting wagers, does the United States Attorney contend and intend to prove that defendant was conducting said business alone and without the aid of other persons?
>
> "If the United States Attorney contends and intends to prove that the defendant was conducting the business in conjunction with other persons, will the United States Attorney please disclose the name or names of such other persons and their address and the time and place of such joint undertaking?"

And on Record, page 20:

> "(7) For each period alleged in Count I and Count II of the Indictment will the United States Attorney disclose the amount of the claimed wagers which he contends and intends to prove the defendant received during each of said periods and on which the United States Attorney contends and intends to prove a tax was due under the provisions of Section 4401 of Title 26, U.S. Code?"

The trial court denied these motions (R. 4). The questions were again raised as error in the Motion for a New Trial (R. 161) and urged as error before the United States Court of Appeals for the Eighth Circuit and the lower court affirmed (Appendix C).

(3) It was conceded at the trial that petitioner filed no returns and paid no wagering taxes (R. 78).

The evidence of the Government showed that witnesses made wagers with petitioner during the periods involved; that in the opinion of the witnesses petitioner was a "bookmaker" (R. 46, 49, 53, 74) and life insurance applications listed his occupation as "bookmaker" (R. 58).

The Government's case failed to substantiate any of the claimed acts of evasion alleged in the indictment (R. 11-12) and failed to show any conduct of claimed wagering business at the Park Plaza Hotel, either by telephone or otherwise. The uncorroborated testimony of one Samuel Golden was to the effect that he conducted a wagering business at his cigar store, but he claimed he was working as an employee for petitioner (R. 28, 29). The only claim of "evasion" made by the Government in the trial court was that the names of the witnesses who claimed to have made wagers with petitioner were not found in the income tax records of petitioner seized at petitioner's residence (Exhibits 23, 24 and 25).

Petitioner requested an instruction to the jury, reading as follows (R. 107):

"VII.

"You may not find the defendant guilty of a wilful attempt to defeat and evade the wagering taxes as charged in the two counts in this indictment, if you find only that he had wilfully failed to make a return of wagering tax income and had wilfully failed to pay

the tax on claimed wagers placed with him." (Spies vs. U. S., 317 U.S. 492)

which the court denied, and the question was raised in the Motion for a New Trial (R. 162) and urged as error before the United States Court of Appeals for the Eighth Circuit.

(4) The Government tried its case on the theory that petitioner was a "bookmaker" and asked for opinions of witnesses to that effect (R. 47, R. 50 to 53) (R. 54), to which question objections were made and overruled (R. 47, 50, 51, 54).

Petitioner requested of the Court the following instructions (R. 106, 107):

"V.

"The statute provides that one must be 'engaged in the business of accepting wagers on sports events or contests.'

"To be engaged in business of accepting wagers, one must hold himself out to the public as one who will accept wagers on the results of both sides of sports events or contests. These persons are commonly referred to as 'bookmakers.' To be a bookmaker, one makes a public quoting and offering of odds, with the solicitating of bets, and induces the public to take chances with him on contests and events; the passing of money or property, and the resulting win or loss on the transaction. The term 'bookmaker' comes from the keeping of a book or paper to record the wager. (Words & Phrases)

"VI.

"The tax is not applicable to persons who make personal or individual, social or friendly bets or wagers on the result of sporting events or contests, no matter how many such wagers are made or in what amount they are made, so long as one is not engaged in the busi-

> ness. Therefore, before you can find the defendant guilty of the offenses here charged, you must find from the evidence and beyond a reasonable doubt, that the defendant was engaged in the business of accepting wagers. If you find from the evidence that the wagers he made were of a personal or individual character, then the Government has not established the first requirement of its burden and that ends your deliberations, and you must find the defendant not guilty."

which the Court denied.

The jury returned for additional instructions (R. 153) and requested of the Court a legal definition of "bookmaker" (R. 154). The Court declined to answer the question and stated:

> "I don't think you need a legal definition of the term bookmaker." (R. 154)

The jury asked another question:

> "Definition of taking bets on both sides. That seems to be a point." (R. 155)

The Court answered:

> "I don't think you need any legal definition of taking bets on both sides." (R. 155)

Petitioner duly objected to the additional instructions given by the Court (R. 157, 158) and raised the question as error in the Motion for a New Trial (R. 163) and urged the same as error in the United States Court of Appeals for the Eighth Circuit.

REASONS FOR ALLOWANCE OF WRIT

1. Search Warrant issued without probable cause, and Exhibits 23, 24 and 25 not particularly described in Warrant nor being used in committing crime.

There was no evidence or cause presented to the United States Commissioner that a wagering business was being conducted at the dwelling house of petitioner. Long-distance telephone calls, and surveillance of defendant without some evidence of connection to a wagering business would appear to be insufficient — *U. S. vs. Lassoff*, 147 F. Supp. 944 (DC Ky.) — or the fact that defendant had a reputation of being a gambler — *U. S. vs. Clay*, 239 F. 2d 196 (USCA 5).

Exhibits 23, 24 and 25 (R. 83, 84, Supp. R. 261) were not particularly described in the search warrant (R. 7-8) and no person had previously sworn that they had been in the premises or saw anyone conducting such business on said premises and such things being used to violate the law (Supp. R. 169-172). *Marron vs. U. S.*, 275 U.S. 192, 72 Law Ed. 231; *Go-Bart Importing Co. vs. U. S.*, 282 U.S. 344, 75 Law Ed. 374. No violations of Federal laws were taking place on the premises in the presence of the seizing officers — *Marron vs. U. S.*, supra — and at the trial the seizing officer testified he couldn't say whether the Exhibits 23, 24 and 25 were correctly or incorrectly kept (R. 93-94).

General searches have not been approved by this Court — *Go-Bart Importing Co. vs. U. S.*, supra — and searching officers have no right to seize and carry away what they think can be used as evidence — *Gouled vs. U. S.*, 255 U.S. 298, 65 Law Ed. 647; *Kremen vs. U. S.*, 353 U.S. 346, 1 Law Ed. (2) 876. It would appear the rights guaranteed to peti-

tioner by Amendment IV of the Constitution of the United States were violated and that the rulings and decisions of the lower courts are directly in conflict with the opinions of this Court here cited.

2. The indictment failed to inform the petitioner of the nature and cause of the accusation, and the trial court abused its discretion in denying petitioner's request for particulars lacking in the indictment.

(a) The indictment merely gives the residence of the petitioner, but gives no information as to the city, county or state where the alleged business was conducted. *U. S. vs. Bowman*, 137 F. Supp. 385 (DC DC), states that the venue for violations of the wagering tax laws is where the business is conducted, not where the tax should have been paid. *Lowrey vs. U. S.*, 161 F. 2d 30 (USCA 8), states the indictment must show the offense committed within the territorial jurisdiction of the court, and *U. S. vs. Smith*, 16 FRD 372 (DC Mo., J. Whitaker), appears to tell us that petitioner was entitled to be so informed *as a matter of right*.

(b) Petitioner requested information as to whether the Government was contending petitioner was associated with others in the alleged business. The indictment did not inform petitioner, and the court refused to petitioner that information on his request for a bill of particulars.

We read *U. S. vs. Simmons*, 96 U.S. 360, 24 Law Ed. 819, to instruct that where a crime is caused to be carried on through a third person, the third person must be named in the indictment so as to properly inform defendant of the nature of the charge. *Roviaro vs. U. S.*, 353 U.S. 53, 1 Law Ed. (2) 639, appears to also so hold.

Petitioner did not raise this question on the Motion to Dismiss because the indictment did not disclose the defect. We contend the motion of the petitioner for a directed verdict of acquittal at the completion of the testimony properly raised the question (R. 102-103-104). *Sommemberg vs. U. S.*, 264 Fed. 327 (USCA 9). The question was raised in the Motion for a New Trial (R. 162) and urged as error in the United States Court of Appeals for the Eighth Circuit.

(c) The indictment failed to state tax due in a substantial amount or in any amount.

It has always been an essential element of a tax evasion prosecution that there be tax due in a substantial amount. *McKenna vs. U. S.*, 232 F. 2d 431 (USCA 8); *Nunan vs. U. S.*, 236 F. 2d 576 (USCA 2); and since it is an essential element to be proved, it would seem it must be alleged in the indictment. *U. S. vs. Lamont*, 18 FRD 27 (US DC NY); *U. S. vs. Hess*, 124 U.S. 483, 31 Law Ed. 516; *U. S. vs. Carll*, 105 U.S. 611, 26 Law Ed. 1135. Where the tax due is a fixed amount, such as an occupational tax, a general allegation of failure to pay is sufficient. *Ledbetter vs. U. S.*, 170 U.S. 606, 42 Law Ed. 1162. The allegation in the indictment that defendant owed taxes and was required to pay them was a mere conclusion of the pleader. *Anderson vs. U. S.*, 11 F. 2d 938 (USCA 7). This information was also denied to defendant in his application for a bill of particulars.

It would seem that this Honorable Court, in the exercise of its supervisory powers over criminal procedures, should recognize this Petition and express itself again on the necessity of prosecutors complying with the dictates of Amendment VI as it relates to fully informing an accused of the nature of the charge against him. Since the enactment of the Rules of Criminal Procedures, prosecutors are inclined

to over-simplify indictments, and to such an extent that the accused is not adequately informed of what he must meet. In the case at bar, it would seem the accused had a right to know in advance where the Government contended he was "doing business" . . . was it in Minneapolis, or Las Vegas or Chicago or where. If the Government proposed to place a man on the stand who would admit the commission of a crime, but claim he was a mere employee of the accused in the performance of the acts, certainly the accused should know that in advance of trial. It is not uncommon for persons arrested for offenses to blame their acts on the persuasion of others, and without any corroboration of any kind it can be seen how unfair and prejudicial the evidence would be and was. The indictment should state a substantial amount of tax due. Certainly if he owed $1.00 tax at the time of the evasion, no court would hold him guilty of a felony. Hence the requirement that it be substantial.

Under the Rules of Civil Procedure the Courts are very strict in requiring litigants to disclose names of witnesses, the amount of claims and how arrived at, and all evidence surrounding the claims and counterclaims of the litigants, so that when the parties enter that courtroom they are fully informed. But in criminal cases, with the skimpy indictments now proposed and the rule that the granting of bills of particulars rests in the discretion of the trial court, unless the trial judge sees his way clear to direct the prosecutor to disclose additional information, the accused has to go on trial wholly uninformed of what he must meet. This seems extremely unfair when we consider that his reputation and liberty are at stake.

It would seem that the skimpy indictment in this case, and the failure of the court to direct a bill of particulars to

accused, presents a case that reasonably warrants the granting of this petition so that this court can issue its instructions on proper procedures to follow in the future.

3. Affirmative acts of evasion not proved, and petitioner entitled to charge that wilful failure to file return and/or pay tax insufficient to convict.

Petitioner contends here and he did so in the lower courts that there was no evidence of affirmative acts of evasion. The Government contended that failure to include entries in petitioner's income tax records of bets made with the witnesses constituted sufficient evasion, and that petitioner's business transactions at the Park Plaza Hotel could also be considered by the jury even though there was an entire lack of showing of any connection with a wagering business.

This Honorable Court, in *Spies vs. U. S.*, 317 U.S. 492, 87 Law Ed. 418, stated in answer to similar contentions:

> "But we think a defendant is entitled to a charge which will point out the necessity for such an inference of wilful attempt to defeat or evade from some proof in the case other than that necessary to make out the misdemeanors. * * *"

The instruction requested here was identical with the instruction requested in the *Spies* case and it would seem that defendant-petitioner was entitled to such a charge as a matter of right, and the failure of the court to so instruct was in direct conflict with the *Spies direction*.

4. The petitioner had a right to have the trial court define for the jury in its charge the meaning of the words "doing business' and also the meaning of the term "bookmaker".

It would appear from *Ledbetter vs. U. S.*, 170 U.S. 606, 42 Law Ed. 1162, that to be "engaged in business" as contemplated by these Federal statutes, one must "hold himself out to the public" as being engaged in the endeavor. Petitioner feels he had a right to have an instruction defining those items. Personal or social wagers are not subject to tax unless one is engaged in business of accepting wagers, and for that reason a clear defining instruction was necessary so that the jury would clearly understand the law to be applied to the evidence. Petitioner feels his Requested Instructions V and VI correctly stated the law applicable.

Inasmuch as the Government tried its case on the claim that petitioner was a "bookmaker" and obtained opinions from witnesses that petitioner was a "bookmaker" it would seem the jury had a right to know the meaning of the term in order to discharge its responsibility and what conclusions to draw from that testimony. *Ballenbach vs. U. S.*, 326 U.S. 607, 90 Law Ed. 350. The jury apparently did not know what constituted "bookmaking" for it specifically requested the Court to define the term. In New York, Chicago, Kentucky and California, the term may be well known and understood, but Minnesota does not have horse racing and other games where bookmakers are available so that the business is not known to the average citizen of this State.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA,
FOURTH DIVISION
No. 8932 Cr.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID BOHN, with aliases MR. DAYTON, DEAN MARTIN, JOE MILLER, and HARRY DAVIS,

Defendants.

MEMORANDUM AND ORDER

(Filed September 10, 1957)

The defendant has moved for an order directing the government to return to him certain property seized by government agents under search warrants issued in November, 1956, and for an order suppressing the use of all such property as evidence for the reason that it was allegedly seized unlawfully.

The matter was argued and the parties have submitted briefs. The court has read all of the briefs and the rather extensive file consisting principally of affidavits submitted in support of the search warrants. I have read the pertinent law.

The defendant's principal contention is that there was a lack of probable cause to justify the issuance of the warrants.

The law governing probable cause is stated by the United States Supreme Court in *Dumbra v. United States*, 268 U.S. 435, 441 (1925), as follows:

> "In determining what is probable cause, we are not called upon to determine whether the offense charged has in fact been committed. We are concerned only with the question whether the affiant had reasonable grounds at the time of his affidavit and the issuance of the warrant for the belief that the law was being violated on the premises to be searched and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant."

It should be noted that probable cause is not synonymous with "beyond a reasonable doubt." They are widely different. *United States v. McGuire*, 300 F. 98. Probable cause does not require legal evidence sufficient to convict. *Washington v. United States*, 202 F. 2nd 214.

As to the question of probable cause, it must be remembered that the Court Commissioner was the one charged with the duty of determining the existence of probable cause. His decision to issue the warrants on the basis of the evidence presented to him was a judicial decision. I cannot substitute my judgment for his in the matter. I can only determine whether he acted arbitrarily or capriciously or without adequate grounds when he issued the warrants.

On the basis of my examination of the files, in the light of the law, I am satisfied that the Court Commissioner did not act arbitrarily or capriciously, and that there was probable cause shown for the issuance of the search warrants in question directed toward the property named.

Defendant's motion is denied. It is so ordered.

September 10, 1957.

EDWARD J. DEVITT
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 15,983

DAVID BOHN, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

[November 6, 1958]

Linus J. Hammond for Appellant.

Kenneth G. Owens, Assistant United States Attorney (Clifford Janes, United States Attorney, was with him on the brief) for Appellee.

Before SANBORN, WOODROUGH and VOGEL, Circuit Judges.

WOODROUGH, Circuit Judge.

David Bohn was convicted on jury trial of attempting to evade and defeat wagering excise taxes owing by him in violation of Section 7201, Internal Revenue Code of 1954 (26 U.S.C.A. § 7201) which provides:

"Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the

payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Section 4401, Internal Revenue Code of 1954 (26 U.S.C.A. § 4401) imposes the excise tax as follows:

"(a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

* * * * *

"(c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery."

Section 4421, Internal Revenue Code of 1954 (26 U.S.C.A. § 4421) defines "wager" as follows:

"(1) Wager.—The term 'wager' means—

(A) Any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers."

The indictment was in two counts: the first covering the fiscal year ending June 30, 1956, and the second, the period from July 1, 1956 to on or about February 27, 1957. On the verdict of guilty as to the first count the court ordered the defendant to be put on probation and on the same verdict as to the second count, imprisonment for a year and a day and a fine of $5,000 were imposed. The defendant appeals.

It appeared on the trial that in his applications for life insurance in 1954, and in 1955 during the indictment period, the appellant described his occupation as "card room operator" and "bookmaker" and in his federal income tax returns he reported that his principal business activity was "Gambling (dice & cards)" from which he reported adjusted gross income in 1954 of $11,200; in 1955, $14,391; and in 1956, $15,165.64. But as early as 1952 certain revenue agents called on him and informed him about the statutory regulation and requirements for keeping records and making returns in respect to wagers on sports events placed with a person engaged in the business of accepting such wagers and the excise tax of 10 percent thereon. Thereafter, in March of 1954, a notice was served on him by the Internal Revenue Service that he was not maintaining sufficient records and advising him of the requirements. It was stipulated on the trial that appellant never purchased an occupational tax stamp of $50.00 and that he never filed returns for wagers on sports events or paid any excise tax on such wagers.

There was evidence that although appellant's tax returns listed his place of business at his home, during the indictment period, he had two rooms rented in the Park Plaza Hotel in Minneapolis which he had equipped with a Western Union Sports Ticker used to receive reports of scores on all types of sports events throughout the country. He also had two telephones installed in the rooms with non-published numbers. He used aliases in registering for the rooms and the utilities and when called on to make a deposit in connection with long distance calls he used cash money.

Internal revenue agents kept a watch on him for a period and also ascertained the number of his long distance telephone calls at his home and at his quarters in the hotel.

They obtained the telephone numbers and names of the holders of the telephones to whom appellant talked long distance. They also watched him going back and forth in his car between his home and the hotel, observed items that he carried on his person, observed him at work in his hotel quarters through binoculars, and learned who his associates were. They interviewed many persons and obtained sworn statements from them and in November of 1956, made application to the United States Commissioner at Minneapolis for search warrants to search the person of appellant, his residence and his rooms at the Park Plaza Hotel for described records, books and papers, they had reason to believe were there concealed and used in his attempt to evade and defeat wagering excise taxes due from him.

No attempt was made to entrap appellant or to tap his telephone wires, but the circumstantial evidence accumulated and presented in the affidavits of twenty of the agents, together with attached exhibits, satisfied the Commissioner that there was probable cause to believe that described property, including bookmaking and wagering documents and paraphernalia, was intended for use and had been and was being used as a means of committing offenses in violation of specified statutes, including Section 7201, and was being concealed on the described premises. The issuance and service of the search warrants produced government exhibits 23, 24 and 25, which included a certain black red-bound ledger type book and writings and accounts having to do with appellant's business. On analysis these exhibits tended to show that appellant was excluding his wagering transactions from his accounts and concealing all evidence of them.

On the trial the government called five witnesses: Samuel Golden and Martin F. Weimar of Minneapolis; Joe F. Blind-

man of Jonesboro, Arkansas; Thomas Buchanan of Fargo, North Dakota; and Anthony Couri of Peoria, Illinois, each of whom testified that he had placed many wagers on sports events with appellant during the indictment period. Their testimony presented a clear picture of the ways and means by which appellant engaged in and carried on the business of accepting wagers over the telephone at his residence and at his hotel quarters. Their testimony was to the effect that an aggregate of between $190,000 and $250,000 in wagers on sports events had been placed with appellant by these witnesses alone during the indictment period. They obtained the odds, handicaps, and terms of the wagers over the telephone from appellant. They chose the side to bet on and the amount of the wager. There was evidence that appellant accepted wagers on both sides of individual sports events. All the transactions were in cash, delivered personally and sent through the mail, and where payment was by bank money order, appellant was not named as payee but arranged to obtain his money thereon without having to endorse his name. He carried no bank account to reflect, in the ordinary way, his receipts from his business and memoranda recording his wagering activities were destroyed.

In addition to appellant's own admission that he was a bookmaker, which the dictionary defines as a professional receiver of bets, witnesses who placed wagers with him as such and knew of the fact, testified positively that he was a bookmaker. It was fairly inferrable, as shown by the context of their testimony, that they meant that he was engaged in the business of accepting wagers on sports events.

There was also substantial evidence that appellant concealed and misstated facts concerning his wagering business. In his income tax returns he described his place of business

as being the same as that of his residence and made no mention of his hotel quarters where he was constantly engaged in accepting wagers on sports events. He described his occupation as "Gambling (dice & cards)" and made no reference to his wagering on sports events. He used aliases in registering and paying for his hotel rooms and the paraphernalia adapted to carrying on the business of wagering at the hotel. Computations and figuring of income for return purposes, included in the books and papers seized under the search warrants, show that he excluded all reference to the wagers he made with the five witnesses above mentioned. He kept the numbers of the telephones in the hotel room unlisted. His acts were adapted to conceal and mislead as to his wagering activities.

The court gave the following instructions to which no exceptions were taken at the time:

"* * * a law of the United States provides as follows:

"'Each person who is engaged in the business of accepting wagers shall be liable for and shall pay * * * (a tax) * * * on all wagers placed with him.'

"The tax imposed is an excise tax and the law provides that the amount of the tax is 10 percent of the amount of the wager.

"The obligation to pay the tax arises when the wager is accepted by the person engaged in the business of accepting wagers. Thus, the tax is not applicable to persons who are not engaged in the business of accepting wagers who make so-called friendly or personal bets.

* * * * *

"Now, you will note that the defendant is not charged with gambling. In fact, there is no Federal law against gambling. That is a matter normally handled by State and local governments. The defendant is not charged with any kind of an income tax violation. He is not

charged with failing to pay the $50 gambling occupational tax, but he is charged with wilfully and knowingly attempting to evade and defeat the wagering tax due and owing the United States.

"The term wager as used in the law which I read to you a moment ago means any wager with respect to a sports event or a contest placed with a person engaged in a business of accepting such wagers.

* * * * *

"To establish its case the Government must prove beyond a reasonable doubt the following three elements:

"First, that during the period charged in the indictmen the defendant was engaged in the business of accepting wagers.

"Second, that substantial excise tax on those wagers was due and owing by him to the United States.

"Third, that the defendant willfully attempted to evade and defeat the tax.

"The gist of the offense charged in the indictment is a willful attempt on the part of the taxpayer to evade or defeat the 10 percent excise tax imposed on wagers. The word 'attempt' as used in this law involves two things: An intent to evade or defeat the tax and some act done in furtherance of this intent. The word 'attempt' contemplates that the defendant had knowledge and understanding that during the period charged in the indictment he had accepted wagers upon which a 10 percent excise tax was imposed, and which he was required by law to report and to pay, and that he attempted in some manner to evade and defeat that tax. In proving its case that defendant attempted to evade and defeat the tax, the Government is required to show beyond a reasonable doubt that the commission of acts by defendant calculated to mislead and conceal, in addition to proof that defendant willfully failed to file excise tax returns and pay the excise tax.

* * * * *

"The word 'willful' as used in the law I have read to you means: With knowledge of one's obligation to pay the tax due, and with intent to defraud the Government of that tax."

Appellant contends on this appeal that the court erred: (1) in refusing peremptory instructions for defendant for insufficiency of evidence; (2) in denying the motion to dismiss the indictment as fatally defective; (3) in denying defendant's motion for bill of particulars; (4) in denying his motion to strike and suppress evidence given by the witness Samuel Golden; and (5) in certain rulings on the trial.

That wagers with respect to sports events were placed with appellant in large and in small amounts constantly from day to day throughout the indictment period was established by competent evidence and whether appellant was engaged in the business of accepting such wagers and excise tax was due from them was submitted to the jury under clear and proper instructions. The evidence shows that appellant not only failed to report his wagers in respect to sports events, and failed to pay excise tax on them, but there was abundant evidence of affirmative acts on his part adapted to conceal and secrete them. All of the elements of the charge were supported by substantial evidence and the denial of peremptory instructions for defendant was without error.

Appellant contends that the indictment was fatally defective because it failed to allege that he owed wagering taxes in a substantial amount. But the indictment did charge that he engaged in the business of accepting wagers and became liable and was required to pay the excise tax of 10 percent of the amount of the wagers and by bill of particulars it was

explained that the total amount of wagers accepted by appellant was unknown but that the government had evidence and expected to prove at the trial as to the first count that 10 percent excise tax was owing by appellant on wagers of approximately $100,000 and as to the second count 10 percent on wagers of approximately $50,000. Thus appellant was clearly charged with owing excise taxes and sufficient approximations of the amounts were given him. Other alleged defects of the indictment do not require discussion. We are satisfied that the indictment stated an offense in each count and sufficiently informed appellant and identified the offenses charged. The ruling in respect to it was without error.

The requests in appellant's motion for a bill of particulars argued here are: (a) to be informed of the city and state where his business was conducted; (b) whether he conducted it alone or with others, and if with others, their names; (c) the names of those who placed wagers with him, and; (d) the amount of wagering taxes due.

Appellant complains, especially under (b) and (c), that he was not informed that one Samuel Golden would be called as a witness. Golden ran a small cigar store and restaurant in Minneapolis and constantly and continuously placed wagers in respect to sports events with appellant. Persons came to the store and placed bets which Golden placed with appellant. At certain times appellant paid him $75.00 per month. The government called Golden as its first witness and he did not testify to any participation in appellant's attempt to evade tax which was the gist of the charge against appellant. He knew relevant evidential facts and was in the same category as the other witnesses who told of the defendant's accepting wagers on sports events from them and the details of the transactions. We

do not hold and are cited to no federal law establishing that the government was obliged to give the appellant the names of the witnesses it intended to use. The decision of Justice Whittaker (then District Judge) in *United States v. Smith*, 16 F.R.D. 372, cited and relied on by appellant declares no such obligation. The prosecution there was for the sale of narcotics and the court held, on motion for bill of particulars and in the exercise of its discretion as to count one of the indictment, that defendant should be told the time and place and the names of the persons to whom the alleged unlawful sales were made and whether the purchaser was in the employ or acting at the instance of the government. The court then held that "* * * the government (having given the facts respecting the offenses, and the name of the person with whom the defendant is alleged to have dealt) should not be required to state the names and addresses of the witnesses it proposes to use upon the trial." 16 F.R.D. at 367. We find no abuse of discretion in denying the motion for bill of particulars in this case; nor in receiving the evidence of the witness Samuel Golden; nor in refusing to grant a mistrial because Golden was called and permitted to testify. If there had been any prejudicial surprise to appellant in Golden's testimony, appellant could have asked for continuance to present rebuttal. But he chose to stand on the evidence given by the witnesses the government called, without taking the witness stand or offering any evidence, and may not dispute it here.

Complaint is made that the court did not give the jury a definition of the words of the statute "a person engaged in the business of accepting such wagers". Counsel did not formulate and request a definition that would better describe the transactions subject to the excise tax and we are not

persuaded that the court was required to do so. The word "business" and the phrase "engaged in business" are of common usage and there is no reason to treat jurors as though they were unfamiliar with them. The question whether appellant was "engaged in the business" as charged in this case was a question within ordinary understanding of a taxpayer or of a juror. *United States v. Gordon*, 3 Cir., 242 F.2d 122, 126-127; *Kahn v. United States*, 9 Cir., 251 F.2d 160, 162.

Appellant also complains that the court erred in failing to properly and correctly define the meaning of the word "bookmaker" and of the meaning of the words "placing bets on both sides of a transaction". When the jury requested a legal definition of the term bookmaker, the court stated:

> "Well, I didn't give you a legal definition of the term bookmaker. There isn't any in the statute. I don't think you need a legal definition of the term bookmaker. I believe some of the witnesses said what they thought a bookmaker was. I could give you the dictionary definition of it, but I don't know as you need to be concerned about what a bookmaker is. I think you need to draw a factual conclusion as to whether or not the defendant comes within the requirements of the statute, and one of the requirements was and is that a person, in order to be subject to the payment of this 10 percent excise tax, be a person engaged in the business of accepting wagers.
>
> "Now it may well be and you may well conclude that that means bookmaker. That is the parlance of the street, but the law defines a person who is subject to the tax as a person who is engaged in the business of accepting wagers. * * *"

To the jury's request for a definition of "taking bets on both sides of the odds" the court gave substantially the same explanation. The court then instructed the jury that they should not lose sight of their mission, to find out whether or not appellant was engaged in the business of accepting wagers; whether or not he was liable for the excise tax; whether he filed the required returns and paid the tax; and whether he had committed an affirmative act which would indicate his intent to defeat or evade the tax.

We think the court properly directed the jury's attention to its primary function and the real issue for determination. While some other matters have been presented and fully considered, they do not require discussion.

We hold that the judgment appealed from is without error and it is in all respects,

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
September Term, 1958

No. 15,983

[Thursday, November 6, 1958]

DAVID BOHN, *Appellant,*

vs.

UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

This cause came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments and sentence of the said District Court, in this cause, be, and the same are hereby, affirmed.

And it is further ordered by this Court that the defendant in the said District Court, David Bohn, do surrender himself to the custody of the United States Marshal for the District of Minnesota, if not now in custody, in execution of the judgments and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the said District Court.

November 6, 1958

FILE COPY

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FILED
DEC 31 1958
JAMES R. BROWNING, Clerk

No. 547

In the Supreme Court of the United States

OCTOBER TERM, 1958

DAVID BOHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
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Assistant Attorney General,
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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 547

DAVID BOHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was rendered on November 6, 1958. The petition for a writ of certiorari was filed on December 1, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether there was probable cause for issuance of the search warrant.

2. Whether petitioner was sufficiently advised of the nature of the charges against him.

3. Whether the evidence showed affirmative acts by petitioner sufficient to sustain the charge that he willfully attempted to evade and defeat the tax in question.

4. Whether the trial court erred in refusing to define the term "bookmaker".

STATUTES INVOLVED

26 U. S. C., Supp. V, 4401 provides:

> (a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.
>
> * * * * *
>
> (c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

26 U. S. C., Supp. V, 4421 provides:

For purposes of this chapter—

> (1) Wager.—The term "wager" means—
>
> (A) Any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers,
>
> * * * * *

26 U. S. C., Supp. V, 7201 provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000 or im-

prisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT

Petitioner was convicted in the District Court for the District of Minnesota of attempting to evade and defeat wagering excise taxes owed by him. The indictment was in two counts, covering the periods from July 1, 1955, to June 30, 1956, and from July 1, 1956, to February 27, 1957, respectively. Sentence was suspended on the conviction under the first count and petitioner was placed on probation for five years. On the second count petitioner was sentenced to imprisonment for a year and a day and a fine of $5,000 (R. 10–13, 159–160, 161–165).[1] The evidence may be summarized as follows:

1. Numerous witnesses testified to placing bets in substantial amounts with petitioner on baseball, football and basketball games during the period covered by the indictment.[2] Payment was made either in

[1] "R" refers to Volumes I and II of the record, which are consecutively paged. "Supp. R." refers to Appellee's Supplemental Record in the Court of Appeals.

[2] Government witnesses testified to placing bets with petitioner as hereafter indicated:

Martin M. Weinar, bets during the 1956 football season totaling between $2,500 and $3,000 (R. 48).

Joe F. Blindman, bets during 1955 totaling between $60,000 and $75,000 (R. 50).

Thomas Buchanan, bets during the 1955 football season totaling approximately $800 (R. 53).

Anthony J. Couri, bets during the 1955 football season, $6,000 to $8,000; during the 1955–1956 basketball season, around $20,000; during the 1956 football season, $8,000 to $9,000 (R. 75).

Samuel Golden, who first placed personal bets with petitioner,

cash or in cashier's checks payable to the bettor, indorsed by him and transmitted to petitioner (R. 50, 55–57, 75–76, 173–187, Supp. R. 24–25, 80). Petitioner would receive bets on either side of a contest (R. 35, 101). Petitioner settled periodically with the larger bettors (R. 36, 47, 50, 75).

Petitioner, in applications for insurance, gave his occupation as "Bookmaker" (R. 58, 61, 189–199). On his income tax returns, however, petitioner gave his occupation as "Gambling (Dice and Cards)" (R. 231, 243). On petitioner's 1956 income tax return he claimed deductions for business expenses as follows (R. 251–259):

Rent, Plaza Hotel	$1,350.00
Rent, The Sands, Las Vegas	117.35
Telephones	4,646.81
Ticker service	450.00
Gorham Press Service	1,300.00
Gorham schedules	250.00
Total	$8,114.16

Petitioner had a sports ticker in his hotel suite (R. 71, 72). He was seen on frequent occasions with known gamblers (Supp. R. 41, 52–53, 58, 59, 61–62, 64–65, 76). Petitioner operated at the Park Plaza Hotel in Minneapolis under various fictitious names (R. 69–71, 64–67, 207–231). Two unlisted direct line telephones were installed in his suite (R. 67, 70, 209).

later received them for petitioner, who paid him $50 to $75 per week. Golden testified that the bets he received for petitioner ran to about $200 a game during the 1955 World Series, about $1,500 to $2,000 a week during the 1955 football season and between $2,500 and $3,000 a week during the 1956 football season (R. 26–35).

It was stipulated that during the period covered by the indictment petitioner did not pay any federal wagering taxes or file any wagering tax returns, nor did he buy the occupational tax stamp in the amount of fifty dollars required of those in the business of accepting wagers (R. 78).

Prior to the period covered by the indictment petitioner had been informed of the requirements of the law in this respect by Internal Revenue agents, who personally visited him on May 6, 1952 (R. 81–82) and further gave him written notice that he was keeping inadequate records for income tax purposes (R. 98, 262–264). Thereafter he kept a record purportedly covering such matters (Government Exhibits 23, 24 and 25). The first entry in Government Exhibit 23 reads:

> First gamble since receiving notice to keep better records from Agent Radford. Was in Minneapolis Recreation Parlor at four-o-clock and won $2.75 betting on a pool game that was going on.

These exhibits purport to show a running account of wagering transactions, with a continuing total figure, which was later transferred to petitioner's income tax returns, but do not set forth transactions with any of the individuals named *supra*, at pp. 3–4, fn. 2 (R. 85–90, 231–235, 243–247).

2. The United States Commissioner issued a number of search warrants for the search of various persons and places, including petitioner's residence (R. 7–9). The warrant authorized search for "all books,

memoranda, records, correspondence and covers relating to and used in the business of bookmaking and of accepting and of receiving wagers in such business on the above described premises * * *" (R. 8). Supporting the application for search warrants were a number of affidavits showing numerous long distance calls to and from petitioner's telephone (Supp. R. 31–34, 48–51, 60–70), many of which were to known gamblers (Supp. R. 29–30, 32, 34, 38–40, 43–44, 46–47, 70, 71, 72–74); registered mail sent to petitioner by known gamblers (Supp. R. 53, 73–74); surveillance by officers, which showed petitioner's close association with known gamblers (Supp. R. 41, 52, 58, 59, 61–62, 64–65, 76); the fact that he maintained a sports ticker at his hotel suite (Supp. R. 81); petitioner's admission to government agents that his income was in part derived from wagers on sporting events (Supp. R. 72), although his 1955 income tax return showed his business as "Gambling (Dice and Cards)"; and the fact that petitioner had not registered or paid the occupational wagering tax (Supp. R. 79). Among the records seized under the warrant were Government Exhibits 23, 24 and 25 (see p. 5, *supra*) purporting to be annual records of petitioner's wagering transactions.

ARGUMENT

1. The existence of such a large amount of intercommunication between petitioner and known gamblers, the maintenance of a sports ticker at petitioner's hotel suite, petitioner's admission to Internal Revenue agents that his income was in part derived

from wagers on sports events although his income tax returns failed to show income from that source, as well as other circumstances discussed *supra,* at page 6, were sufficient to justify a finding of probable cause for the issuance of a search warrant. A reasonably discreet and prudent man would be led to believe that a business of accepting wagers was being conducted by petitioner at these premises. Indeed, in the language of Mr. Justice Stone, "Absence of a well-grounded belief that such was the fact could be ascribed only to a lack of intelligence or a singular lack of practical experience on the part of the officer." *Dumbra* v. *United States*, 268 U. S. 435, at 441. Governments Exhibits 23, 24 and 25, purporting to keep a running account of such wagers, was sufficiently described by the search warrant, which included all books and records relating to the business of accepting wagers on the premises (R. 8). It may be assumed that the agents could not know prior to the seizure whether the books were an accurate or inaccurate account of the business, but in either event they were an instrumentality of the wagering business. Section 4901 of 26 U. S. C., Supp. V, provides that "No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 (wagering) * * * until he has paid the special tax therefor." See also 26 U. S. C., Supp. V, 4413. Since petitioner had not paid this tax it was unlawful for him to be so engaged and the books were subject to seizure under a warrant as instruments of the crime. See *Marron* v. *United States*, 275 U. S. 192, holding that books could be seized without a warrant.

2. The indictment was sufficient to enable petitioner to prepare his defense and there was no error in refusing the demand for a bill of particulars.

(a) It is claimed that the indictment does not charge where the offense was committed. Both counts of the indictment charge that petitioner "in the City of Minneapolis, State and District of Minnesota, did wilfully and knowingly attempt to evade and defeat the said wagering excise tax due" (R. 11, 12). That was the venue proved.

(b) It is further claimed that the indictment was insufficient in that it did not inform petitioner as to whether he was being charged with being associated with others in the alleged business. But petitioner was not charged with causing the crime to be committed by others. The only evidence which even tended in that direction was to the effect that petitioner paid one Golden, a government witness, fifty to seventy-five dollars a week for a time to receive bets at his cigar store. Golden was only a temporary employee not implicated in the charge of evading the wagering excise tax. Cf. *United States* v. *Calamaro*, 354 U. S. 351.

(c) Nor does the law require, as contended, that the amount of the tax due be stated. The government voluntarily filed a bill of particulars stating that the total amount of excise due was unknown, but that the government expected to prove that, on Count I, approximately $10,000 tax was due on gross wagers in the approximate amount of $100,000 and, on Count II, a tax of approximately $5,000 on gross wagers of approximately $50,000 (R. 24–25). The gist of the

offense is the attempt to evade. The amount of the tax due is in no way important so long as the amount is substantial, which was plainly evident in this case. *United States* v. *Nunan*, 236 F. 2d 576, 585 (C. A. 2).

The indictment here was amply sufficient to apprise petitioner of every element of the charge made against him and to bar any subsequent prosecution for the same offense. *Haynes* v. *United States*, 285 U. S. 427, 431. The court did not abuse its discretion in denying the motion for particulars. *Wong Tai* v. *United States*, 273 U. S. 77, 82.

3. Petitioner's contentions that the government failed to prove affirmative acts on his part sufficient to show that he attempted to evade and defeat the tax and, further, that the court's instructions on this point were insufficient, are without substance. *Spies* v. *United States*, 317 U. S. 492, relied upon by petitioner, did not hold that the evidence of affirmative acts of evasion was insufficient, but only that the court had failed to instruct on the matter. It was pointed out, 317 U. S. at 499, that such an attempt might be inferred from keeping a double set of books, making false entries, covering up sources of income, or any conduct the likely effect of which would be to mislead or conceal. This kind of evidence was abundantly supplied here, where petitioner failed to record bets amounting to a large sum, operated under assumed names, required payment in cash or in checks which did not bear petitioner's name, and made his income tax returns in such a manner as to conceal information which would reveal his liability for the wagering excise tax.

The court charged that the gist of the offense was to evade or defeat the ten percent excise tax imposed on wagers; that this included an intent to evade payment of a tax known to be due *and some act done in furtherance of the intent;* that such acts might be shown by engaging in business under false and fictitious names, entering false and misleading information as to the business of the taxpayer on his income tax return, keeping incomplete records of income and business transactions, making false and misleading entries and avoiding the keeping of records usually kept or required by law (R. 148–149). The charge more than adequately covered the subject matter of petitioner's requested Instruction VII (R. 107) and well stated the law as set forth in *Spies* v. *United States, supra.* Immediately, after refusing to define "bookmaking" for the jury in response to its request for such definition (see *infra*), the court called the jury's attention to its mission, to find out whether petitioner was engaged in accepting wagers and "whether or not he committed an affirmative act, acts of commission as distinguished from acts of omission which would indicate his intent to seek to avoid the payment of his just tax willfully" (R. 156).

4. The trial court did not err in refusing petitioner's requested Instruction V[3] or in failing to define

[3] The requested instruction read as follows (R. 106): "* * * To be engaged in business of accepting wagers, one must hold himself out to the public as one who will accept wagers on the results of both sides of sports events or contests. These persons are commonly referred to as 'bookmakers.' To be a bookmaker, one makes a public quoting and offering of odds, with the soliciting of bets, and induces the public to take chances with him

"bookmaker" and placing of "bets on both sides" when definition of those terms was requested by the jury (R. 154–156). Whatever may be the merits of the definition contained in requested Instruction V in a jurisdiction where gambling is legal, it is certainly not accurate in a state such as Minnesota, where gambling is illegal and there can scarcely be a holding "out to the public." As the court pointed out to the jury, the question under this statute was not whether petitioner was a bookmaker, but whether he was engaged in the business of accepting wagers, which might be somewhat more narrow. *Kahn* v. *United States*, 251 F. 2d 160 (C. A. 9), certiorari denied, 356 U. S. 918. The jury was adequately instructed as to the occupation named in the statute (R. 154–156).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

MALCOLM ANDERSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

DECEMBER 1958.

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on contests and events; the passing of money or property, and the resulting win or loss on the transaction. The term 'bookmaker' comes from the keeping of a book or paper to record the wager (Words & Phrases)."

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IN THE

Supreme Court of the United States

October Term, 1958

No. 547.

DAVID BOHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI; AND PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

October Term, 1958

No. 547

DAVID BOHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

A

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

Petitioner, David Bohn, respectfully moves for leave to file the annexed petition for rehearing of the order of this Court denying the petition for writ of certiorari in this case, entered on January 12, 1959. Rehearing is sought at this time because the same issue which petitioner seeks to present—whether the denial of his motion at the trial for the production of the relevant grand jury minutes of the principal prosecution witness for use in cross-examination constitutes error—is now pending before this Court on certiorari to the United States Court of Appeals for the Fourth Circuit in *Pittsburgh Plate Glass Company v. U. S.*, 260 Fed. 2d 397, and *Galax Mirror Company v. U. S.*, 260 Fed. 2d 397, certiorari granted December 15, 1958.

Justice requires that petitioner, who was sentenced to a year and a day and fined the sum of $5,000, and who is now confined at the U. S. Penitentiary, Terre Haute, In-

diana, should receive the same opportunity to have his judgment of conviction reviewed by this Court as has been accorded the corporate defendants, Pittsburgh Plate Glass Company, Inc. and Galax-Mirror Company, Inc.

Although this petition for a rehearing is filed after the expiration of the time prescribed in Rule 58, it is based upon substantial grounds available to the petitioner, although not previously presented, and the Court clearly has power, in its discretion, to entertain the petition.

Schriber-Schroth Co. v. *Cleveland Trust Co.; et al.*, 305 U. S. 47, 50;
Zap v. *U. S.*, 330 U. S. 800;
Land v. *Dollar*, 341 U. S. 737, 738;
Pickett v. *Union Terminal*, 314 U. S. 704.

April 28, 1959.

SOLOMON S. GOLDSMITH,
Attorney for Petitioner.

B

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its order of January 12, 1959, denying the petition for writ of certiorari and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit in the above entitled case, as prayed for in the petition heretofore filed herein.

Reasons for Granting Rehearing and Issuing the Writ

Upon the original petition herein there was not presented to the Court, although available to the petitioner, the following substantial ground for the granting of a writ of certiorari.

1. That the denial of defendant's motion at the trial for the production of the relevant Grand Jury testimony of Samuel Golden, the principal witness for the prosecution, for use in cross-examination, constituted reversible error.

Rule Involved

Rule 6(e) of the Federal Rules of Criminal Procedure, 18 U. S. C. (Supp. V, 1938), is printed as Appendix A.

Statement

Background Facts.

The petitioner, a resident of Minneapolis, Minnesota, was indicted by a Federal Grand Jury in the United States District Court for Minnesota on two counts on April 5, 1957, charged with wilfully attempting to evade and defeat the 10% wagering taxes imposed by Section 4401, Internal

Revenue Code, Title 26, U. S. Code, Section 4401, in violation of Section 7201, Internal Revenue Code, Title 26, U. S. Code, Section 7201 (R. 10-13). On May 23, 1957, petitioner moved for a bill of particulars and requested, so far as here material, that the prosecution state whether it claimed that he was conducting the business of accepting wagers alone or in conjunction with others, and if with others, the name of such person or persons (R. 19).

On June 10, 1957, petitioner's motion for a bill of particulars was in all respects denied (R. 4). On September 20, 1957, the government filed a voluntary bill of particulars which did not, however, set forth the requested particulars (R. 24-25).

The trial began on September 30, 1957, before a court and jury. The first and principal prosecution witness was Samuel Golden (R. 26-46, 57, 101-102). Golden had been indicted for conducting the business of accepting wagers, and entered a plea of guilty in April, 1957 (R. 40). After he gave the government a statement, which included the claim that he worked for petitioner, he was sentenced in April, 1957, to a fine of $500 and three years' probation (R. 44).

Golden testified to accepting bets in substantial amounts on behalf of petitioner on baseball, football and basketball games during the period covered by the indictment (R. 26-35). The government at first attempted to establish that Golden was in partnership with petitioner (R. 26), and later that he was employed by him (R. 30), Golden testifying that petitioner paid him $75 a week for his services (R. 39).

Golden also testified that petitioner "accepted wagers on both sides of sports events" (R. 101). This testimony was particularly important, as evidenced by the fact that the jury, after deliberating for some four hours, returned with a request for a "definition of taking bets on both

sides", the foreman stating "That seems to be a point" (R. 155). The Court refused to give the jury the requested definition, saying that he did not think the jury needed it (R. 155). The Court then proceeded to emphasize the importance of this testimony by noting "that if a person bets on both sides of a sporting event, it is strong evidence of the fact that he is engaged in the business of accepting wagers" (R. 155). While the Court stated that it was his recollection that the testimony "about taking bets on both sides" was given by Mr. Tuttle, an Internal Revenue Agent (R. 155), the fact is that that testimony was given by Golden (R. 101). Mr. Tuttle had testified that he told the petitioner that if he accepted bets on both sides of a contest that might constitute a wagering business, but that he secured no information at that time that petitioner was engaged in the wagering business such as the law contemplated (R. 94).

The government considered the testimony with respect to accepting wagers on both sides of a sports event sufficiently important to recall Mr. Golden to testify on that very point, and this was the last evidence submitted to the jury before the government rested its case (R, 101-102).

Motion to Inspect Golden's Grand Jury Testimony

During the cross-examination of Golden it was elicited that he had testified before the Grand Jury which had returned the indictment against petitioner. The following motion was thereupon made:

> "Mr. Hammond: I make a motion that the government be directed to submit to me the transcript of the man's testimony before the Grand Jury.
> The Court: The motion is denied.
> Mr. Hammond: Exception" (R. 39).

Petitioner's motion made after the prosecution rested, to strike Golden's testimony on the ground that the infor-

mation with respect to his association, if any, with petitioner, which was requested in a bill of particulars, had been refused, with the result that a petitioner was surprised and prejudiced by Golden's testimony, was denied (R. 102).

At the close of the case on October 4, 1957, the jury returned a verdict of guilty on both counts (R. 159). Sentence was suspended on the conviction under the first count and petitioner was placed on probation for five years. On the second count petitioner was sentenced to imprisonment for one year and a day and a fine of $5,000 (R. 159-160, 161-165).

ARGUMENT

I

The grand jury testimony of Golden, the principal prosecution witness, should have been produced under the rule laid down by this Court in *Jencks* v. *United States*.

Jencks v. *United States*, 353 U. S. 657, held that defendant was entitled to the production of the reports to the Federal Bureau of Investigation made by two of its undercover agents who testified for the prosecution, for use in cross-examination. The relevancy and materiality of the reports, it was held, are established by showing that these reports relate to the testimony of the witness; that to require proof showing conflict or inconsistency would be "clearly incompatible with our standards for the administration of criminal justice in the federal courts"; and that justice requires that the defendant himself inspect the reports rather than have the trial court look for conflicts or inconsistencies.

Defendant's right to a transcript of any sworn statement given by Golden on the subject matter of his trial testimony for use in cross-examination is unquestioned

under the authority of *Jencks*. Unless, therefore, grand jury minutes are exempt from the standards for the administration of criminal justice enunciated in *Jencks*, the grand jury testimony of Golden, the principal witness for the prosecution, should have been produced under the *Jencks* rule.

II

The *Jencks* decision is applicable to the grand jury testimony of a witness who testifies in open court for the prosecution on the same subject matter as that of his grand jury testimony.

The argument that grand jury minutes are exempt from the standards for the administration of criminal justice, enunciated in *Jencks*, is based on the traditional secrecy of grand jury proceedings. Where, however, the grand jury witness has testified at the trial, to the extent that he covers the same subject matter, the secrecy of his grand jury testimony has been destroyed. Golden having testified at the trial, his grand jury testimony should have been produced for inspection upon petitioner's motion.

III

The trial court, under Rule 6(e), has discretion to order disclosure of grand jury testimony. The *Jencks* rule has eliminated the necessity for a prior showing of conflict or inconsistency.

It is well established that disclosure of grand jury testimony is wholly proper where sufficient cause is shown. Rule 6(e) specifically permits disclosure at the discretion of the court, and disclosure of grand jury testimony has been ordered. *Doe* v. *Rosenberry*, 255 F. 2d 118 (2d Cir. 1958).

It is well established too, that where defendant can show a contradiction between a witness' testimony at the trial and his grand jury testimony, the defendant may then have access to the witness' grand jury testimony for use in cross-examination.

> *U. S.* v. *Alper*, 156 F. 2d 222, 226 (2d Cir. 1946); *Herzog* v. *United States*, 226 F. 2d 561, 566 (10th Cir. 1955), cert. denied 352 U. S. 844.

In the present case it was established that when Golden was called before the Grand Jury in February 1957 and asked if he worked for petitioner he refused to answer (R. 38). At the trial, it will be recalled, his testimony was that he was employed by petitioner at a salary of $75 a week (R. 39). Even if this does not constitute a conflict or inconsistency, the Court erred in denying petitioner's motion since a prior showing of conflict or inconsistency is no longer necessary under *Jencks* to entitle a defendant to the production of the trial witness' grand jury testimony.

At the very least, even under the practice prior to *Jencks*, the court was required to inspect the minutes for contradictions and to determine if the testimony given at trial by Golden could be impeached through the use of the grand jury minutes. The failure to do so, therefore, was error, even assuming that the petitioner did not himself have the right to inspect the grand jury minutes.

IV

Three Courts of Appeals have considered the problem of grand jury testimony since *Jencks* was decided. *U. S.* v. *Rosenberg*, 245 Fed. 2d 870 (3rd Cir. 1957); *U. S.* v. *Spangelet*, 258 Fed. 2d 338 (2nd Cir. 1958); *Pittsburgh Plate Glass Co.*, and *Galax Mirror Co., Inc.* v. *U. S.*, 260 Fed. 2d 397 (4th Cir. 1958).

In *Rosenberg* the court treated grand jury minutes as on a par with F.B.I. reports, and reversed the trial court

for refusing to order their production as requested by the defense.

In *Spangelet*, the court refused to depart from the prior practice of inspection by a trial judge before permitting the defendant access. The court, however, adopted that branch of the *Jencks* decision which eliminates the necessity for the defendant to show an inconsistency in order to get an inspection by the trial court.

In *Pittsburgh Plate Glass Co.* and *Galax Mirror*, the court held that grand jury testimony should not be produced without prior inspection by the trial court, and that ordinarily the trial court should not inspect.

This Court granted certiorari in *Pittsburgh Plate Glass* and in *Galax Mirror*, limited to the question as to whether the denial of a defendant's motion at the trial for the production of the relevant grand jury minute testimony of the principal government witness in these cases, for the purpose of cross-examination, constituted error.

V

For the reasons stated by the Court in *Jencks*, justice requires that relevant and material evidence in the form of prior statements given to the prosecution by one of its witnesses must be made available to the defendant for use in cross-examination. There is no valid reason why a different rule should apply where the relevant and material evidence consists of testimony given by a witness before a grand jury.

Golden was the prosecution's key witness claiming that he worked for petitioner in the business of accepting wages. His testimony was the foundation upon which the government's case rested (R. 39, 44, 101, 155). In these circumstances the denial of petitioner's motion for the production of his testimony before the grand jury was error.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari it is respectfully urged that a rehearing be granted and that upon such rehearing a writ of certiorari issue to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

SOLOMON S. GOLDSMITH,
Attorney for Petitioner,
60 East 42nd Street,
New York 17, New York.

HAROLD BAER, JR.,
of Counsel.

April 28, 1959.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58, Subdivision 2, of the rules of this Court.

SOLOMON S. GOLDSMITH,
Attorney for Petitioner.

APPENDIX A

United States Code, Supplement V, Title 18
Crimes and Criminal Procedure

Chapter 237. Rules of Criminal Procedure.

Federal Rules of Criminal Procedure for the United States District Courts.

As amended to November 12, 1957.

Rule 6. The Grand Jury.

* * *

(e) *Secrecy of Proceedings and Disclosure.*

Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.